IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION.

WRIT PETITION St. No. 23266 of 2006.
In
Appeal in Notice of 269 of 2005.
In
Interim Notice No. 3399 of 2004.
In
Appeal No. 464 of 1996.
In
R.A.Suit No. 312 of 1984.

Zakiaben M.Merchant ..Petitioner.

Vs.

Zaitunbi Abu Allarakha ..Respondent.

Vijayalaxmi Nikam,Counsel for the Petitioner.

CORAM: V.C.DAGA,J.
DATED: 28.09.2006.

P.C.:-

1] Heard the learned Counsel for the Petitioner. Perused petition.

2] This petition is directed against the Judgment and orders dated 6.9.2003 (Exh.A) together with the orders dated 28.2.2005 and 28.8.2006.

THE FACTS:-

3] Factual aspect of the petition depicts that the Petitioner is a landlady having filed R.A.E. and R.Suit No. 312 of 1984 in Small Causes Court for eviction of the Respondents on 27.10.1983.

4] In the aforesaid Suit, defendants

appeared and filed his W.S. In the year 1993 issues were framed. Thereafter, defendant started remaining absent in the suit. Consequently, on 16.6.1995 the evidence of the plaintiff alone was recorded.

5] On 8.11.1995 ex-parte judgment, order and decree was passed by the Small Causes Court directing eviction of the Respondents-defendants.

6] Defendants took out proceedings for setting aside ex-parte decree vide Interim Notice No. 824 of 1995 on 20.12.1995. The said Notice came to be discharged. Thereafter, he preferred an Appeal against the said order of discharge. Appeal came to be allowed. Ex-parte decree came to be set aside vide judgment and order dated 6.9.2003 (Exh.A)which is being challenged after lapse of more than three years in this petition.However, during pendency of the appeal, decree for eviction appears to have been executed. The defendants were evicted from the suit premises in execution of the decree.

7] It appears that original defendant-tenant forcibly entered into possession of the suit premises, which required the petitioner to file suit under Section 6 of the Specific Relief Act, being Small Causes Suit No. 2329 of 1996 to claim possession of the suit premises.

8] The aforesaid suit came to be decreed by a Judgment and decree and order dated 6th July, 2004. Wherein the Respondent No.1 was directed to hand over the possession of the suit premises to the present petitioner landlady with liberty to the tenant to file appropriate application for restitution of the suit premises under section 144 of the Civil Procedure Code in the pending suit being R.A.E.Suit No. 312 of 1984. The direction was given to the Small Causes Court to decide the Application for restitution on its own merits.

9] It appears that during the pendency of the suit, the Appeal No. 464 of 1996 challenging the dismissal of the Interim

Notice No. 824 of 1995 came to be allowed by the impugned judgment and order dated 6th September, 2003. This order is being challenged by the Petitioner, for the first time, after lapse of more than 3 years; in the present petition.

10] The above undisputed factual matrix reveal that the appeal against the order refusing to set aside ex-parte decree came to be allowed. The original Suit came to be revived. The application moved by the defendant tenant under Section 144 of the Code of Civil Procedure was tried as per the liberty granted by the Small Causes Court. The said Application came to be allowed. The Interim Notice No.3399 of 2004 came to be allowed by an order dated 28.2.2005 against which an appeal was carried being Appeal No.269 of 2005, which came to be dismissed by an order dated 20.8.2006; where under petitioner is directed to restore and to hand over possession of the suit premises to defendant.

11] All these three orders viz. orders

dated 6.9.2006, 28.2.2005 and 20.8.2006 are the subject matter of the challenge in the present petition filed under Article 227 of the Constitution of India.

12] This petition is liable to be rejected for more than one reason. Firstly, challenge to the order dated 6.9.2003; whereby the ex-parte decree came to be set aside, suffers from laches of delay. This order was not challenged by the petitioner almost for more than three years. During this period petitioner had prosecuting her suit filed under Section 6 of the Specific Relief Act in the City Civil Court being Suit No. 2329 of 1996. In this view of the undisputed fact, explanation furnished to explain delay and laches cannot be accepted. This petition challenging the order dated 6th September,2003 is,thus, liable to be dismissed on the ground of delay and laches alone. Even otherwise, on merits the petitioner has no case.

13] So far as order dated 28.2.2005 is concerned, the challenge to the said order is not open because the same is confirmed by the

order of the appellate court vide its order in Appeal No. 269 of 2005, dated 20/8/2006.

14] Therefore, what remains to be considered is the legality of the order dated 28.8.2006 against which this petition is well within time.

15] Having examined orders of both the courts below in the light of the provisions of Section 144 of C.P.C., no fault can be found with the said order. View taken by the Court below is reasonable and possible view. The petition is liable to be dismissed even against order dated 6.9.2006.

16] The learned Counsel for the petitioner relied on some of the Judgments of the Apex Court and that of the High Court; such as,A.I.R. 1994 S.C.853 **(S.P.Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others)** which can hardly be said to be relevant for the purpose of the controversy raised in this petition. Similar is the case with respect of the judgment cited by the learned Counsel for the petitioner in

the case of **A.I.R. 1964 S.C.p.993 (Arjun** Singh Vs. Mohindra Kumar and others).The judgment is also not applicable to the facts of the case. So far as the judgment reported in **A.I.R.1964 Madras, 404 (S.Chokalingam Asari Vs. N.S.Krishna Iyer and others)**is concerned reliance placed thereunder is also misplaced.

Petition is devoid of any substance.

17] In the result, petition is dismissed in limini with no order as to costs.

18] During the course of hearing the learned Counsel for the Petitioner submitted that the daughter of the petitioner has got engaged; and shortly her marriage is likely to take place. In this view of the matter, considered on purely humanitarian ground respondents are directed not to execute impugned order dated 6.9.2006 for a period of four months from the date of this order.

19] The trial Court is also directed to take notice of this time frame fixed by this Court. The petition is,thus, dismissed in limini in terms of this order with no order as to costs.

[V.C. DAGA,J.]